IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5603 of 2006

Mr.Younus Karim Chhagala
and Ors. ... Petitioners

V/s

Mrs.Vatsala Devidas Shirvekar
and Ors. ... Respondents

Shri P.S.Dani for Petitioners (Absent)
Mr S.A.Kazi for Respondents

CORAM:S.R.SATHE,J.

DATED:29th Jan. 2007

P.C.:-

1. Heard the learned Advocate for the Respondent-original defendants. Petitioners-plaintiffs absent when called.

2. As per order passed by this Court on 23-8-2006 (Coram:D.B.Bhosale,J) the petition is heard finally at the admission stage. Hence rule, rule returnable forthwith.

3. The Petitioner has in fact challenged 3 orders

passed by the trial Judge in Special Civil Suit NO.105 of 2004 on 5-1-2006 below Exh.76 on 16-3-2006 and below Exhs. 83 and 88.

4. Plaintiffs filed Special Civil Suit No.105 of 2004 against defendants for partition and separate possession as well as for declaration and injunction.

5. The defendant has filed his written statement Exh.36 and opposed the suit claim on several grounds including that the court has no jurisdiction and the suit is barred by law of limitation.

6. On the pleadings of the parties the learned trial Judge framed the issues. On 31-1-2006 the defendants 8a to 8f filed application for recasting of issues and suggested several issues including an issue regarding jurisdiction and limitation. The defendant also prayed that the said issues be tried as preliminary issues. However, prayer in that respect was rejected by the trial Court. Thereafter the said defendants filed an application Exh.83 and contended that the plaintiff has not disclosed the cause of action in the plaint and the claim made by the plaintiff is time barred in view of the provisions of Law of Limitation and therefore prayed that the plaint be rejected under Order 7 Rule 11 of C.P.C.

7. The said application was opposed by the plaintiff.

After hearing both the learned advocates the learned trial Judge passed order below Exh.83 and rejected the application filed by the defendants and refused to return the plaint.

8. From perusal of the plaint it is very clear that the plaintiff has made specific averment with regard to cause of action etc. and there is nothing to indicate that there was necessity to reject the plaint under Order 7 rule 11 of C.P.C. So, order passed by the learned trial Judge to that effect is legal and correct. However, at the same time it is clear that the learned trial Judge ought to have framed an issue with regard to limitation, particularly when he himself has made following observation in his order dated 16-3-2006.

> "No doubt it appears prima facie from the contents of para no.11 of the plaint that some of the reliefs claimed by the plaintiffs are time barred".

. He has further observed that :

> "Mere fact is that, some of the reliefs are time barred does not mean that, the entire suit is time barred. It is not the stage to go into the root to find out as to whether on 16-10-2003 any cause of action arose as alleged by the plaintiffs to file the present suit".

. In view of the above observations and the fact that the defendant had taken specific contention that the suit is barred by law of limitation, it was necessary for the trial Judge to frame issue as to, whether plaintiffs' claim is time barred, if so, to what extent? However, he has not done so.

9. It is, therefore, necessary to allow this petition partly and direct the trial Judge to frame the above mentioned issue viz.

> "Whether plaintiffs' claim is time barred, if so, to what extent"

10. Rule partly made absolute and the learned trial Judge is directed to frame issue in the above terms and dispose of the suit in accordance with law.

11. Petition disposed of in the above terms.

(S.R.SATHE,J)